View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by University of Kentucky

University of Kentucky
UKnowledge

3-18-1976

William R. Clifton, Et. Al v. City of Covington

Petition 1973-SC-0463

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Follow this and additional works at: https://uknowledge.uky.edu/ky_appeals_briefs70s

Part of the Courts Commons

Repository Citation

1973-SC-0463, Petition, "William R. Clifton, Et. Al v. City of Covington" (1976). *1970-1979*. 12.
https://uknowledge.uky.edu/ky_appeals_briefs70s/12

This Brief is brought to you for free and open access by the Briefs at UKnowledge. It has been accepted for inclusion in 1970-1979 by an authorized administrator of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

KYSC1973-SC-0463-02
{A139657B-401C-49ED-84DB-9586B45580FE}
{134944}{54-130314:142644}{031876}

PETITION

Supreme Court of Kentucky

Appeal No. 73-463

WILLIAM R. CLIFTON, et al.,
Plaintiffs/Appellants,

vs.

CITY OF COVINGTON,
Defendant/Appellee.

FILED
MAR 18 1976
MARTHA LAYNE COLLINS
CLERK
SUPREME COURT

PETITION FOR RECONSIDERATION BY THE CITY OF TAYLOR MILL

The undersigned, FRANK A. WICHMANN, Attorney for the City of Taylor Mill, hereby submits this Petition for Reconsideration by the City of Taylor Mill and hereby certifies that copy of this Petition for Reconsideration by the City of Taylor Mill was on the ..... day of March, 1976, mailed to: Hon. Daniel J. Goodenough, Judge, Kenton Circuit Court, City-County Building, Covington, Kentucky 41011; Hon. Donald C. Wintersheimer and Charles Wagner, Attorneys for Defendant/Appellee, City of Covington, City-County Building, Covington, Kentucky 41011; Hon. James Gilliece, Judge, Kenton Circuit Court, City-County Building, Covington, Kentucky 41011; Hon. Bert T. Combs, Attorney for Plaintiffs/Appellants, Kentucky Home Life Building, Louisville, Kentucky; and Hon. G. Wayne Bridges, Attorney for Plaintiffs/Appellants, 400 First National Bank Building, Covington, Kentucky 41011.

.....

FRANK A. WICHMANN
Attorney for City of Taylor Mill
400 First National Bank Building
Covington, Kentucky 41011

COURT INDEX PRESS, INC. — 209 Walnut Street Cincinnati, Ohio 45202 — (513) 241-1450

TABLE OF CONTENTS AND AUTHORITIES

STATEMENT OF QUESTION PRESENTED

I. IN THE OPINION HEREIN, HAS THE SUPREME COURT MISCONCEIVED THE ISSUES PRESENTED AND THE LAW APPLICABLE TO THE INTERPRETATION OF THE LANGUAGE OF KRS 81.110 THAT "THE ANNEXATION SHALL NOT TAKE PLACE UNLESS . . . A FAILURE TO ANNEX WILL MATERIALLY RETARD THE PROSPERITY OF THE CITY AND THE OWNERS AND INHABITANTS OF THE TERRITORY SOUGHT O BE ANNEXED . . ."?

Supreme Court of Kentucky

Appeal No. 73-463

WILLIAM R. CLIFTON, et al.,
Plaintiffs/Appellants,

vs.

CITY OF COVINGTON,
Defendant/Appellee.

PETITION FOR RECONSIDERATION BY THE CITY OF TAYLOR MILL

STATEMENT OF THE CASE

A. Nature of Proeedings

This is an action by which the residents and freeholders of an area proposed to be annexed by the City of Covington have remonstrated against the proposed annexation pursuant to the authority of KRS 81.140 and 81.110.

The action was tried to the Court and the Court thereupon entered its Findings of Fact, Conclusions of Law and Judgment permitting the City of Covington to annex the area. The remonstrators appealed and the Supreme Court affirmed the decision of the Trial Court. In its Decision, the Supreme Court did not discuss the legal conclusions of the Trial Court, but simply held that the Judgment of the Trial Court was supported by the evidence. The Decision of the Supreme Court is attached

hereto and made a part hereof as Appendix "A". The Decision of the Trial Court is attached hereto and made a part hereof as Appendix "B".

The City of Taylor Mill is involved in this action in that it annexed a large portion of the area while the litigation in regard to the City of Covington annexation was in process; and filed an independent action alleging that the Ordinance of the City of Covington proposing the annexation was invalid upon procedural grounds. The Trial Court entered a Summary Judgment against the City of Taylor Mill in said action and the City of Taylor Mill appealed the Judgment of the Trial Court; and said appeal (73-809) was consolidated with this appeal, and the City of Taylor Mill was permitted to file an Amicus Curiae Brief in this appeal.

B. Facts

The only issue involved in this Petition for Reconsideration is the failure of the Supreme Court to recognize that the erroneous conclusions of law of the Trial Court are the primary issue in this appeal. Accordingly, the substantive facts established by the evidence in this action are not material to the questions presented in this appeal, except the fact that more than 50% of the resident freeholders of the area proposed to be annexed remonstrated. (Tr. 330-1)

ARGUMENT

I. IN THE OPINION HEREIN, HAS THE SUPREME COURT MISCONCEIVED THE ISSUES PRESENTED AND THE LAW APPLICABLE TO THE INTERPRETATION OF THE LANGUAGE OF KRS 81.110 THAT "THE ANNEXATION SHALL NOT TAKE PLACE UNLESS . . . A FAILURE TO ANNEX WILL MATERIALLY RETARD THE PROSPERITY OF THE CITY AND THE OWNERS AND INHABITANTS OF THE TERRITORY SOUGHT TO BE ANNEXED . . ."?

The purpose of this Petition for Reconsideration in regard to this appeal is to convince the Supreme Court that, in its Decision herein, the Supreme Court has completely misconceived the issues presented in this appeal in regard to the application of the language of KRS 81.110 that:

> "The annexation shall not take place, unless . . . a failure to annex will materially retard the prosperity of the city and the owners and inhabitants of the territory sought to be annexed . . . ."

In its Decision in regard to this appeal, the Supreme Court determined that there was ample evidence to support the Trial Court's finding that:

> ". . . a failure to annex the territory will materially retard the prosperity of the city, and the owners and inhabitants of the territory sought to be annexed."

The main issue in this appeal is not if the evidence supports the findings of the Trial Court. The main issue is whether the conclusions of law of the Trial Court are correct in regard to the interpretation of the previously

quoted language in KRS 81.110. If the interpretation of that statutory language indicated in the Judgment of the Trial Court is correct, then the Judgment is correct and should be affirmed. If the interpretation of that statutory language indicated in the Judgment of the Trial Court is not correct, then the Judgment is incorrect and should be remanded for a decision in accordance with a proper interpretation of the statutory language.

As indicated in the Amicus Curiae Brief of the City of Taylor Mill, the Court of Appeals of the Commonwealth of Kentucky has given the statutory language completely opposite interpretations in the opinions of *Lexington* v. *Rankin,* 278 Ky. 388, 128 S.W. 2d 710 (1939); and *Ward* v. *City of Ashland,* Ky., 476 S.W. 2d 205 (1972). In *Lexington* v. *Rankin,* supra, the Court stated:

> "The legislature, for some reason, has seen fit to make it extremely difficult for cities, and especially cities of the second class, to annex adjacent territory where a majority of the inhabitants of such territory are opposed to annexation."

In *Ward* v. *City of Ashland,* supra, the Court of Appeals stated that the principle that:

> "The clear policy of the law towards encouragement of municipal expansion and against a fine weighing of the relative benefits and burdens rest upon justice and good sense."

was applicable to proposed annexations by second class cities where more than 50% of the resident freeholders remonstrated.

In this action, the Trial Court clearly indicated that it was interpreting the statutory language in accordance with *Ward* v. *Ashland,* supra, because, after citing the *Ward* v. *Ashland* opinion, the Court concluded its opinion with the following sentence:

> "Under this philosophy of the law and under the facts introduced into evidence in this action, this court finds that failure to annex this area will result in the retardation of the prosperity of not only the City of Covington but also of the inhabitants of this area."

The opinion in *Ward* v. *City of Ashland,* supra, is clearly erroneous in its conclusion that the principle announced in the *City of Hickman, Inc.* v. *Choate,* Ky., 379 S.W. 2d 238, that:

> "The clear policy of the law toward encouragement of municipal expansion and against a fine weighing of the relative benefits and burdens rests upon justice and good sense."

was applicable to proposed annexations by second class cities where more than 50% of the freeholders remonstrated. The source of this error was a failure to recognize and distinguish the two tests involved in annexation cases indicated in the Amicus Curiae Brief filed herein. In the *City of Hickman, Inc.* v. *Choate,* supra, the remonstrators had the burden of proving material injury, whereas in *Ward* v. *City of Ashland,* supra, the City had the burden of proving material retardation of the prosperity of the city and of the owners and inhabitants of the area. The principles applicable to cases involving one test are not applicable to cases involving the other test.

Accordingly, in cases where the city has the burden of proving a material retardation of the prosperity of the city and the owners and inhabitants of the territory to be annexed, the policy of the law is not to encourage municipal expansion; but, on the contrary, as indicated in *Lexington* v. *Rankin,* supra, the Legislature has seen fit to make it extremely difficult for cities of the second class to annex adjacent territory where a majority of the inhabitants of such territory are opposed to the annexation.

CONCLUSION

Since the Judgment of the Trial Court in this action was premised upon the erroneous philosophy of the law indicated in *Ward* v. *City of Ashland,* supra, the Judgment itself is erroneous and this action should be remanded to the Trial Court for a decision in accordance with the principles indicated in *Lexington* v. *Rankin,* supra.

Respectfully submitted,

FRANK A. WICHMANN

Attorney for City of Taylor Mill

400 First National Bank Building

Covington, Kentucky 41011

APPENDIX A

RENDERED: February 20, 1976

SUPREME COURT OF KENTUCKY

73-809

CITY OF TAYLOR MILL, KENTUCKY,
Appellant,

vs.

CITY OF COVINGTON, KENTUCKY,
Appellee.

Appeal From Kenton Circuit Court, Third Division
Honorable Robert O. Lukowsky, Judge
Civil Action No. 24131

MEMORANDUM OPINION PER CURIAM

AFFIRMING

The City of Taylor Mill instituted this action against the City of Covington to have declared void Covington's ordinance annexing certain territory located between Taylor Mill and Covington, and to obtain a judgment upholding Taylor Mill's annexation of most of the same territory. Taylor Mill's ordinance proposing to annex the territory was passed about four days after that of Covington's. The

Kenton Circuit Court, Third Division, granted a summary judgment in favor of Covington. In another action by remonstrators against Covington the Kenton Circuit Court, Fourth Division, upheld the annexation by Covington. The disposition of the appeal of that case is found in Clifton, et al. v. City of Covington, decided February 20, 1976.

We find no merit in Taylor Mill's argument that since the publication of the ordinance was more than 21 days prior to the expiration date for remonstrance the ordinance did not comply with the general statute KRS 424.130 (1) (b) which provides that advertisement shall be published "* * * not less than seven (7) days nor more than twenty-one (21) days before the occurence of the act or event." In effect Taylor Mill is complaining that too much notice was given. Nor do we believe the notice was fatally defective when it was directed to "resident freeholders" instead of "residents or freeholders" as provided by KRS 81.110 (*1*). It is noted that KRS 81.110 (*2*), also pertaining to remonstrance proceedings, speaks only of "freeholders." Regardless of technical wording, the fact remains that 83.6 percent of the persons eligible to protest joined in the remonstrance suit, establishing the fact that notice was extremely widespread.

The court is of the opinion that the record justified the trial court's conclusion that there was no genuine issue of fact as to whether the annexation ordinance met the statutory requirement that the property be accurately described.

Taylor Mill contends that the summary judgment precluded it from introducing proof on the issue of whether the board of commissioners acted arbitrarily in enacting the annexation ordinance. The trial court properly took judicial notice of the proceedings and judgment in *Clifton,* where the question of arbitrariness was fully explored. We

find no reversible error in the trial court's granting the summary judgment in favor of Covington.

We find no merit in Taylor Mill's last contention that KRS 81.140 is unconstitutional in that it provides for delegation of legislative power in a manner which violates the federal and state constitutions.

The judgment is affirmed.

All concur except Lukowsky, J., who did not sit.

ATTORNEY FOR APPELLANT:

Frank A. Wichmann
400 First National Bank Building
Covington, Kentucky 41011

ATTORNEYS FOR APPELLEE:

Charles P. Wagner
Donald C. Wintersheimer
306 Covington-Kenton County Municipal Building
3rd & Court Street
Covington, Kentucky 41011

APPENDIX B

KENTON CIRCUIT COURT
FOURTH DIVISION

NUMBER 21559

WILLIAM R. CLIFTON, et al.,

Plaintiffs,

vs.

CITY OF COVINGTON,

Defendant.

MEMORANDUM OF DECISION AND JUDGMENT

This litigation involves the attempted annexation of territory in Kenton County by the City of Covington. The City of Covington is a second class city with a population of approximately fifty thousand people. It is the oldest and largest city in Kenton County and is bounded on the north by the Ohio River, on the east by the Licking River, on the west by the cities of Ludlow and Park Hills and to the south by the cities of Ft. Wright, Kenton Vale, Lakeview, Taylor Mill and several small areas of unincorporated territory. The property which is the subject matter of this action is one of the unincorporated areas lying generally to the south of the City of Covington. It is an area of approximately twenty-four hundred acres of some-

what rough, hilly land with the hilltops being suitable for residential and other building uses. This hilltop area constitutes approximately one-half of the total area of the territory sought to be annexed. This area has generally rural and suburban characteristics rather than urban. The population of the entire area is between thirteen hundred and fourteen hundred.

The trial of this action was long and tedious with many witnesses being introduced by both sides and the testimony at times being somewhat cumulative. Approximately eighty per cent of the resident freeholders of this area have remonstrated and asked this Court to disapprove the proposed annexation. Many of those opposing the annexation testified at the trial and informed this Court of their reasons for opposing this annexation. Some of those reasons were legally material and relevant to the issues to be decided and some of the reasons were emotional and not relevant.

As applied to second class cities, KRS 81.110 provides that where more than fifty per cent of the resident freeholders remonstrate, the annexation shall not take place unless there is a finding from the evidence that a failure to annex will materially retard the prosperity of the city and of the owners and inhabitants of the territory sought to be annexed. In applying this test to the evidence presented in this action, the various factors presented by way of evidence and argument will be discussed in detail.

A factor to be considered in any annexation case is whether or not the territory sought to be annexed is adaptable to city use. The area under consideration is partly so adaptable as evidenced by the various subdivisions already existing on the ridge areas. Portions of the area would not be so adaptable because of the steep and rough nature of the land. However, it is the opinion of this

Court that taking the area as a whole, it is suitable for municipal uses. See: *Mitchell* v. *Central City,* Ky., 354 SW 2d 281 (1962).

Having determined that the area as a whole is suitable for municipal purposes, we now must apply the aforementioned test of retardation of prosperity as it applies to the City and as it applies to the residents of this area. To retard prosperity means to delay progress. *Loeffler* v. *City of Louisville,* Ky., 215 SW 2d 535 (1948). Will the progress of the City of Covington be delayed by failure to annex? If the word "progress" is defined as growth, the obvious answer to this question is in the affirmative. By growth, of course, we do not simply mean geographic or territorial growth but also growth in all of the various facets of the socio-economic spectrum of a community. As the old core area of a city begins to deteriorate, it is necessary for a city in order to progress or grow, to have areas within which to expand. Assistance from the federal government to redevelop the older sections through the vehicle of urban renewal is a method used to enable older cities to progress. This method has been utilized by Covington with some success, but in the opinion of this Court, urban renewal alone is not sufficient to insure the growth of a city. New territorial areas for development is also an essential element required for such prosperity. A city should not be placed in a straight jacket. *Masonic Widows and Orphans Home and Infirmary* v. *City of Louisville,* Ky., 217 SW 2d 815 (1948). The Plaintiffs point out that the evidence showed that there are many acres of developable land in the present City of Covington. This is true and if our vision is confined only to the present and the immediate future, it is probably true that the immediate prosperity of the City of Covington will not be retarded by failure to annex. However, growth and de-

velopment of municipalities is not instantaneous and it is the opinion of this Court that we must take a long-range view when considering the question of the prosperity of the City. The City of Covington is an old city which only in the last decade has taken significant steps to grow and prosper. This annexation is one of the steps, and although this Court cannot say that the area in question is of itself vital to Covington's prosperity, it can say that room to expand is vital to Covington and a denial of this annexation would close off a significant avenue for such expansion.

There has been ample evidence introduced to show that over the past ten years the City of Covington has experienced serious financial difficulties. It is not for this Court to determine the cause of those difficulties, but the evidence showing that for the year 1971 the City has been able to operate within its budget demonstrates that those difficulties are not insurmountable. In conjunction with this evidence, the Plaintiffs have introduced testimony hoping to show that this annexation will place a burden on the City which it will not be able to financially meet. From such evidence, this Court cannot conclude this to be so. Whether or not the decision to annex this area was a fiscally wise decision is not for this Court's determination. That was a policy decision to be made by the legislative body of the City of Covington. There has not been sufficient evidence to show that this annexation will over extend the capabilities of the City to provide municipal services to this area.

For the above-stated reasons, it is the opinion of this Court that failure to annex the subject property will materially retard the prosperity of the City of Covington.

Will the prosperity of the residents of the area sought to be annexed be retarded if the area is not annexed by

Covington? To answer this question, we must review the evidence presented concerning the various municipal services offered to this area by the City of Covington as opposed to the services now enjoyed by the residents. The traditional services offered by a municipality would include the following: Police protection; fire protection; garbage collection; street lighting; street and road repair and maintenance; sanitary sewers; water service and general governmental services including planning and zoning, building inspection, police courts, etc.

This area is presently afforded police protection by the Kenton County Police Department which has a complement of approximately twenty men to serve the needs of all the unincorporated areas of the county as well as providing assistance to other police departments within the municipalities in the county. Kenton County has a fine police department and has in the past provided good service for this area. The City of Covington has a much larger police department and has, for this reason, more potential to serve the area in question. This will be especially true in the future as the area becomes more heavily populated.

The Covington Fire Department is a full-time professional fire department which has the capacity to serve this area by adding additional men and the construction of a new firehouse in this area. Certainly, no on can doubt the benefits rendered in the past to residents of the area by the various volunteer fire departments but similarly no one can question the expertise and efficiency of the Covington Fire Department. As with police protection, this Court is of the opinion that the area can best be served by the Covington Fire Department. No doubt the service rendered by the volunteer fire department has been good, but the Covington Department has a greater potential to pro-

vide service in the future as the area becomes more densely populated and becomes more developed.

After annexation, the residents of this area will receive twice weekly garbage collection. Many of the residents now contract with independent haulers for this service. Since Covington provides this service out of its general tax revenues, it would seem that this service will be of benefit to the residents. It is the opinion of this Court that solid waste disposal is a service which can better be provided by municipal government than voluntary individual contract.

Street lights will be installed by Covington after the annexation. Presently the only street lights in the area are those paid for by independent contract of the property owner with the light company. Street lighting, therefore, is a municipal service which will be received by the residents after this annexation and will be of benefit to them.

Concerning street maintenance and road repair, it must first be accepted by all parties that Covington nor any other city will construct new streets other than by assessment of the benefited property owners. The City will be obligated to repair existing streets if they meet City standards and are accepted for maintenance by the City. There are some roads in the area that will not meet these standards and no doubt Covington will either put in new streets and assess the abutting property owners or will decline to repair the existing ones. Therefore, those residents of acceptable streets will receive normal maintenance service from the City and those who do not will either pay for new streets or will receive no maintenance service. Since no one in the area is receiving any type of street maintenance at the present time except those who live on county roads, it must be admitted that maintenance work by the City of Covington's Public Works Department even if only at a

minimum will be better than that which they presently receive. Of course, voluntary assessment or contribution plans may work in some instances, but this Court is of the opinion that, in general, street and road maintenance is more properly accomplished via municipal governmental action.

This annexation will neither help nor hinder the prospect of sanitary sewers being installed in this area. When the area as a whole becomes sufficiently populated to make the installation of sanitary sewers economically feasible no doubt they will be constructed by the entity having jurisdiction. Whether that entity is Covington, Taylor Mill or the Sanitation District, the cost of installing the sewer system will necessarily be borne by the users of the system. In any event, it cannot be said that the progress of this area, at least as it concerns sanitary sewers, is dependent upon annexation.

Many of the residents in this area presently receive water through the City of Taylor Mill's Water Department. The City of Taylor Mill purchases its water from the City of Covington. Therefore, it is apparent that although this area is directly dependent upon the City of Taylor Mill for water, it is ultimately dependent upon the City of Covington as is the entire Taylor Mill distribution system.

In the area of general governmental services including planning and zoning, building inspection, etc., those opposed to this annexation say, "What we have is sufficient," and it probably is for the present. However, the future of this area only shows one thing, growth. The full-time, professionally staffed departments of the City of Covington will best be able to serve this area during and after this growth period. The residents of this area argue that they have good government through the County Fiscal Court and therefore are in no need of city government. This is

a specious argument in that the County Fiscal Court affords services to all residents of the county including those within municipalities. Therefore if this annexation is approved, the residents of this area will not lose the county government but will have it in addition to the city government.

The question of the effect this annexation will have on the schools in this area was raised by the testimony of some witnesses. This Court does not believe that this is a valid issue since the annexation will not affect school district boundaries. Schools will in no way be affected by the outcome of this litigation.

The Plaintiffs introduced some evidence by which they hoped to show that the real estate values would go down in this area if the annexation were successful. This Court found such evidence less than credible and therefore is not convinced that this annexation will in any way affect property values in this area.

The fact that the City of Taylor Mill has also sought to annex this area has been interjected into this action as a reason for not allowing the annexation by the City of Covington. There has been no remonstrance against the Taylor Mill annexation and therefore most of the area in question will become part of that city if Covington is not successful. Many witnesses voiced the general concensus of the residents of this area to be that they preferred remaining outside of any city, but they would choose Taylor Mill over Covington if a choice had to be made between the two. The reason for this choice is obvious. The tax rate of Taylor Mill is lower than that of Covington. This Court does minimize the validity of this reason, but it must discount it in view of the principle of law announced by the Court of Appeals which holds that the payment of taxes is not the type of burden to be considered by this Court in

determining whether or not to uphold annexation. *City of Hickman* v. *Choate,* Ky., 379 SW 2d 238 (1964).

As between Covington and Taylor Mill, it is well settled that the city which took the first public procedural step toward annexation has priority. *City of Lincolnshire* v. *Highbaugh Realty Co.,* Ky., 278 SW 2d 636 (1955). There can be little doubt that if Taylor Mill had taken the first public procedural step toward annexing this property the annexation by Taylor Mill would have been upheld. This is so because the land as a whole is suitable for municipal purposes and the services needed by the area could be provided by Taylor Mill. But Taylor Mill did not take the first step and Covington did. Covington also can provide the services needed by the area to insure its growth and since we have the rule which gives priority to the city which acts first, we must prefer Covington over Taylor Mill. The Plaintiffs complain that Covington "beat Taylor Mill to the draw" and hurriedly passed its ordinance without any plans for the area or any pre-annexation meetings, etc. This may be true but a fact of political life is that as soon as annexation is mentioned, opposition forms and either a new sixth class city comes into being or another city does just what Covington is charged with doing. There is no legal requirement of public hearings, findings of fact, etc. by the legislative body prior to enacting an ordinance proposing to annex. *City of Northfield* v. *Holiday Manor, Inc.,* Ky., 479 SW 2d 596 (1972).

The evidence indicates that the residents of this area have possibly more in common with the residents in Taylor Mill insofar as church, school and normal day to day social contacts are concerned, but this Court has difficulty in seeing how this annexation will change that situation. The invisible corporation line of the City of Covington will not cause the residents of this area to attend a different church

or school. It will not cause them to belong to a different Rotary or Lion's Club or a different swim club or a different Junior Chamber of Commerce. Their lives will continue as in the past except for the fact they will pay taxes to the City of Covington and will be entitled to receive municipal services from it.

The basic argument made by the Plaintiffs is that they receive satisfactory municipal service from the County Police Department, from the Oak Ridge Volunteer Fire Department, from the City of Taylor Mill Water Department, from their independent garbage collectors, from the County Planning and Zoning Commission, from the recreational facilities already existing in the area, from their individual street lighting contracts, from the County Road Department, from the Independence Life Squad and from their own septic tanks and other sanitary sewer facilities. As indicated above, this Court is of the opinion that these various municipal type services can better be provided by Covington. Is such better service sufficient to outweigh the increased taxes with which the area will be burdened? The making of fine comparisons between benefits and burdens is not a proper function of this Court. *City of Louisville* v. *Kraft,* Ky., 297 SW 2d 39 (1956). The judicial task is to be confined to finding such facts as are clear and obvious and in determining whether or not the City's legislative action in proposing the annexation was arbitrary. *City of Northfield* v. *Holiday Manor Inc.,* supra. Although this Court certainly cannot find that those opposing this annexation are doing so without reason it cannot find that the City's desire to annex is without reason and arbitrary. In the very recent case of *Ward* v. *City of Ashland,* Ky., 476 SW 2d 205 (1972), the Court of Appeals has once again stated its position that the policy of the law is to encourage municipal expansion and that the judicial function is not

to finely weigh the relative benefits and burdens resulting therefrom. Under this philosophy of the law and under the facts introduced into evidence in this action, this Court finds that failure to annex this area will result in the retardation of the prosperity of not only the City of Covington but also of the inhabitants of this area.

For the above-stated reasons, the following Judgment is entered:

JUDGMENT

IT IS HEREBY ORDERED AND ADJUDGED that the Complaint herein is dismissed and the City of Covington may proceed with its proposed annexation of the property described in the Complaint. The costs of this action shall be paid by the Plaintiffs.

Copies to:

Hon. Donald Wintersheimer

Hon. G. Wayne Bridges

/s/ LAWRENCE D. WICHMANN
Judge

RENDERED: February 20, 1976

SUPREME COURT OF KENTUCKY
73-463

WILLIAM R. CLIFTON, ET AL. APPELLANTS

V. APPEAL FROM KENTON CIRCUIT COURT
FOURTH DIVISION
HONORABLE LAWRENCE D. WICHMANN, JUDGE
CIVIL ACTION NO. 21559

CITY OF COVINGTON APPELLEE

MEMORANDUM OPINION PER CURIAM

AFFIRMING

The City of Covington passed an ordinance prescribing

There was also ample evidence to support the trial court's finding that the area was suitable for municipal purposes. Cf. Ward v. City of Ashland, Ky., 476 S.W. 2d 205 (1972). There was also ample evidence to support the trial court's finding that the annexation would not place a burden on the city which it could not financially meet.

We do not agree with appellant that the trial court entered a judgment conditioned upon KRS 82.085 tax relief to the residents in the area. The court merely ordered that there be a tax rate reduction to the residents of the territory until a fire and police substation be constructed and placed in service. If any party had the right to object to the order it was the city.

We find no merit in other arguments advanced by appellants.

ATTORNEYS FOR APPELLANTS:

Bert T. Combs
John S. Osborn, Jr.
1700 Kentucky Home Life Building
Louisville, Kentucky 40202

G. Wayne Bridges
400 First National Bank Building
Covington, Kentucky 41011

Tarrant, Combs, Blackwell & Bullitt
of Counsel

ATTORNEYS FOR APPELLEE:

Charles P. Wagner
Donald C. Wintersheimer
306 Covington-Kenton County Municipal Building
3rd & Court Streets
Covington, Kentucky 41011

ATTORNEY FOR AMICUS CURIAE:

Frank A. Wichmann
400 First National Bank Bldg.
Covington, Kentucky 41011

limits. About four days later the City of Taylor Mill passed an ordinance proposing to annex most of the same territory. A remonstrance suit was filed against Covington by over 75 percent of the freeholders. Taylor Mill filed an action against Covington contesting Covington's annexation. The Kenton Circuit Court, Fourth Division, found for Covington in the remonstrance suit. The Kenton Circuit Court, Third Division, found for Covington in the Taylor Mill suit. The disposition of the appeal of the Taylor Mill suit is found in City of Taylor Mill v. City of Covington, this day decided.

The court is of the opinion that there was ample evidence to support the trial court's finding that "* * * a failure to annex the territory will materially retard the prosperity of the city, and the owners and inhabitants of the territory sought to be annexed," as required by KRS 81.110(2).